Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-766

CURTIS WILLIAM MC GHEE, JR.,

Petitioner,

v.

STATE OF IOWA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE

STATE OF IOWA

ALFREDO G. PARRISH
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ATTORNEY FOR PETITIONER

INDEX

	Page
Opinions Below.	2
Jurisdiction.	2
Questions Presented	2
Statutes Rules and Regulations	3
Statement	3
Reasons for Granting the Writ	7
1. Whether petitioner's Fifth Amendment right to silence was violated when an incriminating statement was taken from him during custodial interrogation without the police having first advised him of his right to terminate questioning at any time?.	7
2. Whether a minor in custody has the right to a speedy trial which attaches when a judicial determination is made that probable cause exists to believe he has committed an offense?	14
Conclusion.	13
Appendix A.	App.A-1
Appendix B.	App.B-1

CITATIONS

Cases — Page

Bergman v. Nelson, 241 N.W. 2d 14 (IA. 1976). 16

Commonwealth v. Alston, 456 Pa. 128, 317 A.2d 241 (1974). 10

Commonwealth v. Lewis, 371 N.E.2d 775 (Mass. 1978) 9

Crafton v. State, 545 S.W.2d 437 (Tenn. App. 1976) 10

Dickey v. Florida, 398 U.S. 30 (1970) 20

Flannigan v. State, 289 Ala. 177, 266 So.2d 643 (1972) 9

Green v. State, 45 Ala. App. 549, 233 So.2d 243 (1976) 11

In Re Gault, 387 U.S. 1 (1967) . . .17,18

In Re Interest of Johnson, 257 N.W.2d 47 (Ia. 1977). 17

Page

In Re Winship, 397 U.S. 358 (1970). 18,20

Katzensky v. State, 228 Ga.6, 183 S.E.2d 749 (1971) 10

Klopfer v. North Carolina, 386 U.S. 213 (1967) 15,20

Mack v. State, 348 So.2d 524 (Ala. Crim. App. 1977). 9

Micale v. State, 76 Wis. 2d 370, 251 N.W.2d 458 (1977). . . . 9

Michigan v. Mosley, 423 U.S. 96 (1975) 12

Miranda v. Arizona, 384 U.S. 436 (1966). 8,11, 12

Mock v. Rose, 472 F.2d 619 (6th Cir. 1972), cert. denied 411 U.S. 971 (1973). . . . 11

People v. Hooper, 50 Mich . . App. 186, 212 N.W.2d 786 (1973). 11

Page

People v. Swift, 300 N.Y.S. 2d 639)N.Y.App. Dept. 1969) 9

People v. Washington, 115 Ill. App.2d 318, 253 N.E.2d 677 (1969). 11

Ponzi v. Fessenden, 258 U.S. 254 (1922). 20

State v. Bledoe, 200 N.W.2d 529 (Ia. 1972). 16

State v. Carlton, 83 N.M. 644, 495 P.2d 1091 (1972). 10

State v. Cobbs, 164 Conn. 402, 324 A.2d 234, cert. denied, 414 U.S. 861 (1973). 10

State v. Harbaugh, 132 Vt. 569, 326 A.2d 821 (1974). 10

State v. Harper, 465 S.W. 2d 547 (Mo. 1971) 10

Page

State v. Lucero, 151 Mont. 531, 445 P.2d 731 (1968). 8

State v. Maluia, 56 Haw. 428, 539 P.2d 1200 (1975) 8

State v. Mays, 204 N.W.2d 862 (Ia. 1975). 17

State v. McGhee, 280 N.W.2d 436, (Ia. 1979) 10,4

State v. Parker, 44 Ohio St.2d 172, 339 N.E.2d 648 (1975). 10

State v. Riddick, 291 N.C. 399, 230 S.E. 2d 506 (1976). 9

State v. Sherwood, 139 N.J. Super, 201, 353 A.2d 137 (1976). 10

United States v. Anderson, 401 F.Supp. 996 (N.D. Tenn. 1975) 9

United States v. Di Giacomo,
579 F.2d 112 (10tn Cir.
1978) 10

Statutes

Section 795.1, Code of Iowa,
1977. 15,16

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PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE

STATE OF IOWA

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Curtis William Mc Ghee, Jr., petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Iowa entered in the above case, on June 27, 1979, rehearing denied July 20, 1979.

OPINIONS BELOW

The opinion of the Supreme Court of Iowa is reported in 280 N.W.2d 436 (Iowa 1979) and is also contained in Appendix A hereto, infra, App.A-1. The judgment of the Iowa District Court for Pottawattamie County, Iowa, is not printed. Petitioner was tried in the Iowa District Court by a jury and convicted and there is no opinion of that court.

JURISDICTION

The judgment of the Iowa Supreme Court (Appendix A) was entered on June 27, 1979, rehearing was denied July 20, 1979. The jurisdiction of the Supreme Court is invoked uinder the provisions of Title 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

1. Whether petitioner's Fifth Amendment right to silence was violated when an incriminating statement was taken

from him during custodial interrogation without the police having first advised him of his right to terminate questioning at any time?

2. Whether a minor in custody has the right to a speedy trial which attaches when a judicial determination is made that probable cause exists to beleive he has committed an offense?

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent portions of the United States Constitution, United States Code, Code of Iowa and Supreme Court Rules are set forth in Appendix B at page App. B-2.

STATEMENT

This case arises from the conviction of Curtis McGhee, Jr. of the crime of Murder in the First Degree in violation

of Sections 690.1 and 690.2, Code of Iowa, 1977. Curtis Mc Ghee, who was 17 years old at the time of the commission of the offense, and two companions entered the lot of an auto dealership in Council Bluffs, Iowa on the night of July 21, 1977, intending to steal a car. One of the three (not the petitioner) was carrying a shotgun. The following morning a security guard at the dealership was found dead of a single shotgun wound.

Curtis Mc Ghee was in custody on September 7, 1977 when he was interrogated by a police officer for the City of Omaha, Nebraska. Before interrogation, Curtis McGhee was told by the officer that he had a right to remain silent, that anything you say can and will be used against you in Court, you have a right to consult with a lawyer and have the lawyer with you during the question-

ing, and if you can't afford the lawyer, the Court will appoint one to represent you. Mc Ghee was asked if he fully understood that. And after he replied "yes", he indicated he was willing to make a statement.

Mc Ghee was then asked questions about the events leading up to the July homicide. When he was asked about the victim, Mc Ghee said that he wanted to return to his cell and think about it. About three hours later Mc Ghee was advised of the same rights and interrogated again. During this second interrogation Mc Ghee made incriminating statements which were subsequently used at his trial over defense objections on the ground that at no time had Curtis Mc Ghee been informed that he had the right to terminate the interrogations at any time.

After the interrogations Curtis Mc Ghee was released from custody, but was taken into custody again on December 27, 1977, on suspicion of murder. On December 23, 1977 the cause was transferred to juvenile court, as Mc Ghee was only 17 years old at that time. On that same date was filed a Petition of Delinquency against Mc Ghee. On December 27, 1977, a hearing was held on whether detention should continue, the Juvenile Court finding probable cause that the offense charged was committed as alleged in the delinquency petition. After a hearing on January 20, 1978 the Juvenile Court transferred the cause back to the Criminal Division of the District Court. Mc Ghee was charged with one count of murder in the County Attorney's Information filed on February 24, 1978, fifty-nine days after probable cause had been found that

Mc Ghee had committed the crime. Mc Ghee filed a Motion to Dismiss for failure to indict within 30 days under Section 795.1, Code of Iowa, 1977, which motion was overruled by the trial court.

The Iowa Supreme Court affirmed the actions of the trial court in its opinion of June 27, 1979. A petition for Rehearing was denied on July 20, 1979.

REASONS FOR GRANTING THE WRIT

I.

An important Fifth Amendment self incrimination problem is raised in this case where the Iowa Supreme Court has adopted one of four different positions taken by the State Courts regarding a criminal suspect's right to terminate custodial interrogation at any time.

A Writ of Certiorari should be granted in this case to determine whether a person in custody must be told of the right to terminate questioning at any time before that person is interrogated. Petitioner contends that this Court's decision in Miranda v. Arizona, 384 U.S. 436 (1966) requires that a person be informed of this right before interrogation starts. This question has caused a split among the state's highest Courts and this Court should clarify the point by granting a Writ of Certiorari.

The first position taken by some state courts is that the right must be given as part of the Miranda Warning. State v. Maluia, 56 Haw. 428, 539 P.2d 1200 (1975): State v. Lucero, 151 Mont.

531, 445 P.2d 731 (1968); People v. Swift, 300 N.Y.S. 2d 639 (N.Y. App. Dept. 1969); State v. Riddick, 291 N.C. 399, 230 S.E.2d 506 (1976); Micale v. State, 76 Wis.2d 370 251 N.W.2d 458 (1977), See also, United States v. Anderson, 401 F.Supp. 996 (N.D. Tenn. 1975).

Some states prefer giving the right under the Miranda Warnings, but do not require it. Mack v. State, 348 S.2d 524 (Ala. Crim. App. 1977); Flannagin v. State, 289 Ala. 177, 266 S.2d 643 (1972); Commonwealth v. Lewis, 371 N.E.2d 775 (Mass. 1978).

Several states take the position that failure to advise a suspect of the right to terminate questioning at any time is not error per se, but a factor to be considered in determining the voluntariness of subsequent statements.

This is the position Iowa adopted in deciding Petitioner's case. State v. Mc Ghee, 280 N.W.2d 436 (Ia. 1979); State v. Cobb, 164 Conn. 402, 324 A.2d 234, cert. denied, 414 U.S. 861 (1973); Katzensky v. State, 228 Ga.6 183 S.E2d 749 (1971); State v. Harper, 465 S.W.2d 547 (Mo. 1971); State v. Sherwood, 139 N.J. super 201, 353 A.2d 137 (1976); State v. Carlton, 83 N.M. 644, 495 P.2d 1091 (1972); State v. Parker, 44 Ohio St. 2d 172, 339 N.E.2d 648 (1975); Commonwealth v. Alstron, 456 Pa.128, 317 A.2d 241 (1974); Crafton v. State, 545 S.W.2d 437 (Tenn. App. 1976); State v. Harbaugh, 132 Vt. 569, 326 A.2d 821 (1974); see also, United States v. Di Giacomo, 579 F.2d 1211 (10th Cir. 1978).

Finally, some states do not require that the right be given as part of the Miranda Warning. Green v. State, 45 Ala. App. 549, 233 So.2d 243(1976); People v. Washington, 115 Ill. App.2d 318, 253 N.W.2d 677(1968); People v. Hooper, 50 Mich. App.186, 212 N.W.2d 786(1973). See also, Mock v. Rose, 472F.2d 619(6th Cir. 1972), Cert. denied, 411 U.S. 971 (1973).

The Opinion in Miranda v. Arizona, 384 U.S. 437(1966) supports Petitioner's contention that, of the four different positions taken by the states, requiring the warning of the right to terminate questioning is a prerequisite to interrogation.

> If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to

> remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment Privilege; any statements taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cutoff questioning, the setting of an incustody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has once invoked. Miranda v. Arizona, 384 U.S.473,474.

In discussing this passage, this Court said in Michigan v. Mosley, 423 U.S. 96(1975):

"A reasonable and faithfull interpretation of the Miranda opinion must rest on the intention of the Court in that case to adopt fully effective means... to notify the person 'of his right to silence and to assure the exercise of the right will be scrupulously honored...'. 384 U.S., at 479. The crucial safeguard indentified in the passage at issue is a person's right to cutoff questioning Id. at 474. Through the exercise of his opinion to terminate questioning, he can control the time at which questioning occurs, the subjects discussed and the duration of the interrogation." Id. at 103, 104.

A Writ of Certiorari should be granted so this Court can determine which of the four positions adopted by the state Courts is the most fully effected means to notify a person of the right to silence and to assure that the exercise of that right will be scrupulously honored.

II.

An important Sixth Amendment speedy trial problem is raised if the Iowa Supreme Court is permitted to delay the attachment of the right to a speedy trial in a juvenile case until the case is transferred from the Iowa Juvenile Court System to the Criminal Division of the Iowa District Court.

A Writ of Certiorari should be granted because Petitioner raises an

issue of fundamental importance to our society in the Administration of Juvenile Justice. Petitioner contends that the right to a speedy trial should be afforded to juveniles, and the attachment of that right should not be delayed while the case is in the juvenile courts before being transferred to the criminal courts.

In Klopfer v. North Carolina, 386 U.S. 213, (196[illegible]), this Court held that the Sixth Amendment standards governing speedy trials are made obligatory on the states by the Fourteenth Amendment. Sections 795.1, Code of Iowa 1977, provides in pertinent part:

> "795.1 Failure to indict. When a person is held to answer for a public offense, if an indictment be not found against him within 30 days, the court must order the prosecution to be dismissed."

Section 795.1 is intended to implement the Sixth Amendment and the Bill of Rights which grant to an accused the right to a speedy and public trial. State v. Bledoe, 200 N.W.2d 529 (Iowa 1972). In Iowa, in Juvenile cases if an indictment is not filed within thirty days of the transfer of a case from juvenile court to criminal court then the case must be dismissed under Section 795.1. Bergman v. Nelson, 241 N.W.2d 14 (Iowa 1976). However, the Iowa Supreme Court refuses to apply Section 795.1 to a juvenile case until the case is transferred to the district criminal court, even though Iowa's preliminary juvenile detention hearings satisfy the "held to answer" requirements in that a juvenile officer determines if a crime has been committed and sufficient reason exists to beleive the defendant to be guilty.

State v. Mays, 204 N.W.2d 862 (Iowa 1973).

The Iowa Supreme Court's reasoning is that proceedings in juvenile court are not prosecutions for crime, but rather are special proceedings which serve as an ameloriated alternate to criminal prosecution of children. In Iowa a child is not amenable to prosecution under the criminal statutes until the transfer order is entered. In re Interest of Johnson, 257 N.W.2d 47 (Iowa 1977).

The Iowa Supreme Court draws the distinction between criminal and other proceedings. But this Court in In re Gault, 357 U.S. 1, (1967) expressly rejected such distinctions as a reason for holding the Due Process Clause inapplicable to juvenile proceedings. This Court has made it clear that civil

labels and good intentions do not obviate the need for criminal due process safeguards in juvenile courts, for a proceeding where the issue is whether the child will be found to be delinquent and subject to the loss of his liberty for years is comparable in seriousness to a felony persecution. In re Winship, 397 U.S. 358, 365-366, (1970); In re Gault, 387 U.S. 1, 36, (1967). In light of this, Iowa's distinction is especially weak in that Petitioner was arrested for murder and there could be no doubt that he would be prosecuted as an adult.

The Iowa Supreme Court's decision in Petitioner's case applied the standard set by this court in In re Winship, 397 U.S. 358 (1970), whether direct application of the particular right would be consistent with "fair treatment" and would not "risk destruction of beneficial

aspects of the juvenile process." (Appendix p. 32). The Iowa Court found that Petitioner's contentions would disrupt potential benefits of junvenile proceedings, place unreasonable time constraints on the junvenile and criminal courts, and was beyond the scope of Gault. (Appendix p. 32). But in the Gault decision itself this Court said that the observance of due process standards intelligently and not ruthlessly administered, will not compel the states to abandon or displace any of the substantial benefits of the juvenile process. Gault, supra 287 U.S. at 21. And Petitioner submits that it is inherently fair that he be afforded as soon as possible the consitutional protection of the right to a speedy trial. Resolving juvenile

proceedings with all due speed is a consideration of this court. See, In Re Winship, 397 U.S. 358, 367, (1970).

The right to a prompt inquiry into criminal charges is fundamental, Dicky v. Florida, 398 U.S. 30, (1970). "It is one of the most basic rights reserved by our constitution." Klopfer v. North Carolina, 386 U.S. 213, 226 (1967). A major concern of this court in interpreting this right is with when during the criminal process the speedy trial guarantee attaches. Dicky v. Florida, 398 U.S. 30, 41 (1970) (Justice Brennan, concurring). Petitioner's case presents this issue in the juvenile court context, where the right would attach if the accused were an adult. In a broader context, the Speedy Trial Clause protects societal interests, as well as those of the accused. See, Ponzi v. Fessenden,

258 U.S. 254, 264 (1922). The applicability of the right to a speedy trial in the administration of juvenile justice presents issues of grave importance to our society, and should merit a Writ of Certiorari.

CONCLUSION

For the foregoing reasons Petitioner respectfully requests that the Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. _____

CURTIS WILLIAM MC GHEE, JR.,

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v.

STATE OF IOWA,

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IN THE SUPREME COURT OF IOWA

STATE OF IOWA,)
Appellee,) NO. 62210
vs.)
CURTIS MCGHEE, JR.,) O R D E R
Appellant.)

After consideration by the court en banc, appellant's petition for rehearing in the above-captioned case is hereby overuled and denied.

Done this 20th day of July, 1979.

Chief Justice -
Supreme Court of Iowa

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IN THE SUPREME COURT OF IOWA

STATE OF IOWA,)

Appellee,) Filed June 27, 1979

vs.)

CURTIS MCGHEE, JR.,) 87/62210

Appellant.)

Appeal from Pottawattamie District Court, J.L. Larson, Judge.

Appeal by defendant from judgment of conviction of murder in the first degree in violation of sections 690.1 and 690.2, The Code 1977. AFFIRMED

Alfredo G. Parrish of Des Moines for appellant.

Thomas Miller, Attorney General, Lona Hanson, Assistant Attorney General, and David E. Richter, County Attorney, for appllee.

Considered by LeGrand, C.J. and Rees, Uhlenhopp, McCormick and McGiverin, JJ.

REES, J.

This is an appeal by the defendant, Curtis William McGhee, Jr., from his conviction of the crime of murder in the first degree in violation of Sections 690.1 and 790.2, The Code 1977. We affirm.

The record indicates the defendant, who was 17 years of age at the time of the commission of the offense, and two companions entered the lot of an auto dealership in Council Bluffs on the night of July 21, 1977, intending to steal a car. One of the three (not the defendant) was carrying a shotgun. The following morning a security guard at the dealership was found dead of a shotgun wound.

McGhee was taken into custody

on December 22, 1977, and the case was transferred to the Juvenile Court the following day. On January 20, 1978, after hearing, jurisdiction over the defendant was transferred to the district court. On February 17, 1978, a county attorney's information was filed charging the defendant with murder.

Following disposition of several preliminary motions, the matter proceeded to trial. A verdict of guilty of murder in the first degree was returned by a jury on May 11, 1978. Following denial of defendant's motion for a new trial, McGhee was sentenced to life imprisonment. On June 29, McGhee filed a timely notice of appeal to this court.

Further elaboration upon the facts of the case will be provided in the discussion of the issues to which they pertain.

The following issues are presented for review:

(1) Was the defendant not indicted within the statutory time period set by Section 795.1, The Code 1977, when the county attorney's information was filed less than 30 days after the transfer of the case from the Juvenile Court but more than 30 days following defendant's arrest?

(2) When the minutes of the testimony contained summaries of the expected testimony of certain witnesses as well as a general clause regarding "certain other facts" relating to the offense, should the trial court have sustained the defendant's motion for a bill of particulars requesting specific details concerning such "other facts"?

(3) Does Section 781.10, The Code 1977 which permits a defendant to take

depositions from prosecution witnesses, grant a criminal defendant the right to obtain answers to interrogatories from the prosecuting attorney?

(4) Did the trial court abuse its discretion in admitting into evidence photographs of the decedent prior to the autopsy due to their alleged prejudicial nature and lack of probative value?

(5) Were the Miranda warnings given the defendant constitutionally inadequate when he was not specifically informed that the interrogation would be terminated upon his request?

(6) When a prisoner with whom the defendant had been incarcerated testified at trial that the defendant had confessed to taking part in the crime with which he was charged, should a new trial have been granted upon motion accompanied by an affidavit, executed by another prisoner

who had been incarcerated with the witness, stating that the witness had admitted perjuring himself at trial?

I. Defendant first asserts the trial court erred in overruling his motion to dismiss the charges against him due to alleged noncompliance with Section 795.1, The Code 1977, which requires that either an indictment be found against an individual within 30 days of the person being "held to answer" for a public offense or the prosecution dismissed, in the absence of good cause for the delay.[1] Here an information was filed 57 days after the defendant was taken into custody, but less than 30 days

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[1]In revision of the criminal code this provision was changed to require indictment within 45 days of arrest, absent good cause, Iowa R. Crim. P.27 (2)(a), ch. 813, The Code 1979 (emphasis added). The amended statute was not applicable to this case and we do not pass upon how it would be applied to these facts.

following the transfer of jurisdiction from the juvenile court to the district court.

Defendant's motion to dismiss was couched in statutory terms and thus does not directly present an issue of constitutional dimensions. Although constitutional considerations are argued by the defendant in support of his position, we will consider them only as an aid in construing the statute and making the determination essential to this issue: is a juvenile "held to answer" for purposes of Section 795.1 when he is under the jurisdiction of the juvenile court and not subject to the jurisdiction of the district court for criminal prosecution?

We have previously examined the "held to answer" language of Section

795.1, relation to juveniles transferred to the district court. In Bergman v. Nelson, 241 N.W.2d 14, 15 (Iowa 1976), and State v. White, 223 N.W.2d 173, 175-176 (Iowa 1974), we held that a child subject to the jurisdiction of the juvenile court is not "held to answer" within the meaning of Section 795.1 until he or she is transferred to the district court for prosectuion. We find no compelling reasons to depart from these holdings and thus do not find error in the district court's overruling of McGhee's motion to dismiss.

In State v. White we said: "Proceedings in juvenile court are not prosecutions for crime. They are special proceedings which serve as an ameliorative alternative to criminal prosecution of children". Also, a child is not

amenable to prosecution under the criminal statutes until the transfer order is entered. In re interest of Johnson, 257 N.W.2d 47, 48-49 (Iowa 1977).

The purpose of the juvenile proceeding is to determine the disposition of the matter which would best meet the interest of both the child and the State in preventing the recurrence of dilinquent activity. It is not subject to all the structures applicable to adult criminal proceedings, although we note the legislature has recently provided additional procedural safeguards for the rights of juveniles in revising the juvenile justice provisions of the Code. See ch. 232, The Code 1979. An investigation into the particular circumstances of each child is necessary

before disposition. To adopt McGhee's proposed construction and find a minor "held to answer" either when he is taken into custody or when the juvenile court finds probable cause the juvenile committed the alleged act of delinquency would be to place unreasonable time constraints on both the juvenile authorities and the prosecutor in any eventual criminal trial, due to the fact that a transfer must occur before a criminal prosecution may be commenced against a minor.

McGhee seeks support from the decision of the United States Supreme Court in In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), where the court held that certain constitutional guarantees applicable to adult criminal prosecutions, such as the right to counsel, right to notice of charges,

and right against self incrimination, are also applicable to juvenile proceedings under a due process analysis. In so doing, the Supreme Court has acknowledged that a juvenile delinquency proceeding has several criminal characteristics and left for case-by-case determination the applicability of all rights available to adult-defendants. McKeiver v. Pennsylvania, 403 U.S. 528, 533, 91 S.Ct. 1976, 1980, 29 L.Ed.2d 647, 654 (1971). The standard which has evolved from this line of cases is one of whether direct application of the particular right would be consistent with "fair treatment" and would not "risk destruction of beneficial aspects of the juvenile process", Matter of Winship, 397 U.S. 358, 359, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368, 372 (1970). See also Matter of Tony W., 91 Misc2d

700, 398 N.Y.S.2d 528 (Fam.Ct. 1977); State in Interst of H.M.T., 159 N.J. Suprer. 104, 397 A.2d 368 (1978); Pauley v. Gross, 1 Kan.App.2d 736, 574 P.2d 234 (1977).

To apply Section 795.1 in the manner in which McGhee advocates would not only disrupt the potential benefits of the juvenile proceeding, but would be to apply the 30-day period simultaneously to both juvenile and, in the event of a waiver, district court proceedings. Such an application would be beyond the scope of the doctrine of equal treatment underlying Gault and could place unreasonable time constraints on proceedings. We therefore reaffirm our holding in Bergman v. Nelson and State v. White.

II. McGhee next contends the district court erred in not granting certain clauses of his motion for a bill of particulars dealing with the inclusion in the minutes of testimony of language that witnesses would testify to "certain other facts" concerning the alleged offense of which they had knowledge. Because we conclude that the indictment and the minutes of testimony sufficiently informed the defendant of the nature and extent of the charges against him to enable him to prepare his defense, we find no abuse of discretion on the part of the district court requiring reversal.

A motion for a bill of particulars is authorized, for purposes of this appeal, by Section 773.6, The Code (now Section 813.2, Iowa R. Crim. P. 10(5), The Code 1979). It is addressed to the

sound discretion of the trial court and the trial court will not be reversed unless the discretion is abused. State v. Bean, 239 N.W.2d 556, 562 (Iowa 1976). In State v. Conner, 241 N.W.2d 447, 452 (Iowa 1976), and State v. Lass, 228 N.W. 2d 758, 765 (Iowa 1975), we set forth the following principles regarding a bill of particulars:

(1) A bill of particulars is in legal effect a more specific statement of the details of the offense charged.

(2) Its purpose is to give the defendant information which the indictment (or information) and minutes of testimony by reason of their generality do not supply.

(3) A motion for a bill of particulars should be sustained when the court, in its discretion, finds

the charge and the minutes do not inform the defendant of the specifc acts of which he is accused.

(4) A motion for bill of particulars cannot be used merely as a devise to obtain the State's evidence or theory of the case or unessential allegations.

Here the information and the minutes of testimony adequately informed McGhee of the nature of the charge against him and the evidence by which the State intended to prove he committed the offense. Each of the statements in the minutes of testimony on which the defendant sought elaboration was preceded by a summary of the testimony which would be presented by the individual witness. The defendant sought and received clarification of several other descriptions within the minutes. Additionally,

the defendant does not show any prejudice resulting from the court's ruling. Our examination of the record leads us to conclude that McGhee was adequately informed of the nature of the case against him and that those portions of his bill of particulars which were overruled constituted an attempt to obtain"unessential allegations." We find no reversible error in defendant's contention to the contrary.

III. The defendant next contends the district court erred in denying him the right to file interrogatories seeking information from the State as he is allegedly entitled by Section 781.10, The Code 1977 (now Section 813.2, Iowa R. Crim. P. 12, The Code 1979). We find no error, basing our conclusions on the following reasoning.

McGhee cites State v. Peterson 219

N.W.2d 665, 669 (Iowa 1974), for the proposition that civil discovery techniques are available to a defendant in a criminal prosecution. The scope of the Peterson holding was much narrower: Section 781.10 grants a defendant the right to take deposition of defense witnesses. Section 781.10 provides: "A defendant in a criminal case, either after preliminary information, indictment, or information, may examine witnesses conditionally or on notice or commission, in the same manner and with like effect as in civil actions". We have previously stated, in construing Section 781.10, that Peterson "stands for the proposition the defendant has a right to depose the State's witnesses", and that the prosecutor is not a State witness. State v. Brewer, 247 N.W.2d 205, 211-12 (Iowa 1976).

While we have allowed the use of interrogatories pursuant to Section 781.1, State v. Smith, 262 N.W.2d 567, 570 (Iowa 1978); State v. Brewer, 247 N.W.2d 211, we have not expanded the definition of witness to include the prosecutor, see Brewer, nor do we think the statute can be reasonably construed to allow such an inclusion. There is no indication in the record that the defendant sought to depose any of the State's witnesses pursuant to Section 781.10 and was denied that right. We therefore hold the district court did not err in denying McGhee the right to file interrogatories directed to the prosecutor pursuant to Section 781.10. The prior decisions of this court, as well as the literal language of the statute, mandated this conclusion.

IV. Defendant alleges the trial

court erred in overruling his objections to the admission into evidence of photographs of the murder scene and of the decedent's body prior to autopsy. He claims admission of the pictures to have been an abuse of discretion on grounds that the pictures were irrelevant, cumulative, and prejudicial to his defense.

The determination to admit or to refuse admission into evidence of the photographs lies initially in the discretion of the trial court, and we will not reverse except when an abuse of discretion is shown, as where the evidence is clearly irrelevant or prejudicial. State v. Moore, 276 N.W.2d 437, 441 (Iowa 1979); State v. Cassady, 243 N.W.2d 581, 583 (Iowa 1976). Here the photographs are relevant to material factual issues, establishing the manner and means by

which the decedent was killed, and, while not appealing to the eye, are not so gruesome or cumulative as to mandate reversal. No abuse of discretion is shown.

V. The defendant next challenges the sufficiency of the Miranda warnings given him prior to police interrogation in October of 1978 and the consequent admissibility of certain inculpatory statements he made at that time. Specifically, he objected at trial that he was not informed that the interrogation would cease upon his request. Although it does not appear from the record that McGhee was informed of his right to remain silent, his objection did not include such a ground. Our review is limited to those alleged errors properly preserved. An objection which is overruled at trial is reviewable only on the grounds

specified in the objection lodged at trial. State v. Winquist, 247 N.W.2d 256, 259 (Iowa 1976). We therefore address only the issue regarding termination of the interrogation.

The trial court relied on dicta in State v. Holderness, 191 N.W.2d 642, 648 (Iowa 1971), in concluding that Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), did not mandate the inclusion of language informing a person being questioned that the interrogation would cease upon his request. There this court noted that Michigan no longer found the right to have interrogation cease to be a mandatory part of the Miranda warnings. Concluding that the omission of the right to have questioning cease from the Miranda warnings is not error, we find the ruling of the trial court to have been correct, and

that evidence of the statements was properly admitted.

In State v. Jump, 269 N.W.2d 417, 423 (Iowa 1978), we set out the warnings which are required by Miranda prior to custodial interrogation. They include: (1) the right to remain silent; (2) that anything he or she might say may be used in evidence; (3) the right to have counsel present; and (4) the right to have counsel appointed if the person being interrogated cannot afford counel. We did not list the right to have interrogation cease as a required warning, nor do we find any indication in our case law to mandate such an inclusion.

A vast majority of the jurisdictions which have addressed this issue have reached a conclusion similar to that reached here. United States v. Di Giacomo, 579 F.2d 1211, 1214 (10th Cir. 1978)

(finding the omission not to be error per se but a factor to be considered in determining the voluntariness of the subsequent statements); Mock v. Rose, 472 F.2d 619, 622 (6thCir. 1972), cert. denied, 411 U.S. 971, 93 S.Ct. 2165, 36 L.Ed 693 (1973); Green v. State, 45 Ala. App. 549, 551-52, 233 So.2d 243, (1970); State v. Cobbs, 164 Conn. 402, 416-19, 324 A.2d 234, 244, cert. denied, 414 U.S. 861, 94 S.Ct. 77, L.Ed2d 112 (1973); Katzensky v. State, 228 Ga 6, 8, 183 S.E.2d 749, 751 (1971); People v. Washington, 115 Ill. App.2d 318, 328, 253 N.E.2d 677, 682 (1969); People v. Hooper, 50 Mich. App. 186, 195-96, 212 N.W.2d 786, 790 (1973); State v. Harper, 465 S.W.2d 547, 548-49 (Mo. 1971); State v. Sherwood, 139 N.J.Super. 201, 203-05, 353 A.2d 137, 139-40 (1976); State v. Carlton, 83 N.M. 644, 654, 495 P.2d 1091, 1101

(1972); State v. Parker, 44 Ohio St.2d 172, 177, 339 N.E.2d 648, 652 (1975) (considered only as a factor toward voluntariness determination); Commonwealth v. Alston, 456 Pa. 128, 135, 317 A.2d 241, 245 (1974); Crafton v. State, 545 S.W.2d 437, 439 (Tenn.App. 1976; State v. Harbaugh, 132 Vt. 569, 577-78, 326 A.2d 821, 826 (1974). Jurisdictions which have reached a contrary conclusion include North Carolina and Wisconsin. See State v. Riddick, 291 N.C. 399, 408, 230 S.E.2d 506, 512 (19760; Micale v. State, 76 Wis.2d 370, 374, 251 N.W.2d 458, 460 (1977).

The result we reach is supported by the language in Miranda in which the mandatory warnings are listed, 384 U.S. 479, 86 S.Ct. at 1630, 16 S.Ed.2d at 726. The right to have interrogation

cease is not listed therein. Although it is clear that questioning must cease upon request of the person being interrogated, such an inclusion is not required by the Miranda decision and its omission does not provide a basis for reversal in this case on the ground alleged. Finding our resolution of this issue bolstered by the Miranda opinion, our prior case law, and the decisions of other jurisdictions, we hold that the right to have interrogation cease is not among those rights of which Miranda requires a person to be informed prior to custodial interrogation.

Like the 10th Circuit Court of Appeals and the Ohio Supreme Court, we conclude the omission or inclusion of the right to have interrogation cease goes to the voluntariness of the later statements. Here the issue arose as an abstract determination of the elemental adequacy

of an evidentiary foundation rather than a particular showing of voluntariness. No issue of voluntariness is directly presented in this case, only the adequacy of the evidentiary foundation. We therefore proceed to a consideration of defendant's next alleged error.

VI. At the trial of this case, Tyrone Pierce testified that the defendant had confessed to him involvement with the Schweer murder while they were incarcerated in jail. As a part of his motion for a new trial, the defendant submitted the affidavit of a third person, one Charles Reese, with whom Pierce had been imprisoned, stating that Pierce had admitted perjuring himself at trial. He alleged such newly-discovered evidence to justify or in fact mandate the grant of a new trial. The trial court overruled said motion. We find no abuse of

discretion and sustain the ruling of the trial court.

Trial courts have a considerable discretion in ruling upon motions for a new trial and such rulings will not be overturned absent an abuse of discretion, State v. Sheffey, 234 N.W.2d 92, 98 (Iowa 1975). Additionally, we have said that the recantation of the trial testimony of a witness should be regarded "with utmost suspicion". State v. Jackson, 223 N.W.2d 229, 234 (Iowa 1974); State v. Compiano, 261 Iowa 509, 516-17, 154 N.W.2d 845, 849 (1967). When a new trial is sought on the basis of newly-discovered evidence the following must be shown: (1) the evidence was discovered after trial and before judgment; (2) it could not have been discovered during the trial in the exercise of due diligence; (3) it is

material to the issue and not merely cumulative and impeaching; and (4) such evidence would probably change the result if a new trial were granted. State v. Overstreet, 243 N.W.2d 880, 886 (Iowa 1976); United States v. Frye, 548 F.2d 765, 769 (8th Cir. 1977).

We find the following facts support the ruling of the trial court. The prisoner to whom Pierce allegedly admitted his perjury, Charles Reese, assaulted Pierce in jail prior to Pierce's recantation, which may well have come about from Pierce's resultant fear of Reese. The fact that the supposed recantation came to the court by way of the affidavit of a third person, rather than from the witness, raises additional questions concerning its accuracy. Most importantly, there remained the testimony of two other witnesses to whom McGhee had

confessed involvement in the murder. Our analysis of the record leads us to the conclusion that the new evidence would not have changed the result in this case if a new trial had been granted. Thus, the fourth of the aforementioned cirterias not met. The trial court properly concluded that a new trial was not justified by the newly-discovered evidence.

On the whole record we find no merit in defendant's allegations of error. This case is therefore affirmed.

Affirmed.

APPENDIX B

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. _____

CURTIS WILLIAM MC GHEE, JR.,

Petitioner,

v.

STATE OF IOWA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE

STATE OF IOWA

ALFREDO G. PARRISH
906 Savings & Loan Bldg.
Des Moines, IA 50309
515-244-5737

ATTORNEY FOR PETITIONER

United States Constitution, Amendment V. No person shall be held to answer for a captial, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Military when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime

shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Section 795.1, Code of Iowa 1977. When a person is held to answer for a public offense, if an indictment be not found against him within thirty days, the Court must order the prosecution to be dismissed, unless good cause to the contrary be shown. An accused not admitted to bail and unrepresented by legal counsel shall not be deemed to have waived the privilege of dismissal or be held to make demand or request to enforce a guarantee of speedy trial, and the court

on its own motion shall carry out the provisions of the sections as to dismissal.

AFFIDAVIT OF SERVICE

STATE OF IOWA)
) SS:
COUNTY OF POLK)

I, Alfredo G. Parrish, depose and state that I am the attorney of record for Curtis William Mc Ghee, Jr., the petitioner herein. Pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing petition for a Writ of Certiorari on each of the parties required to be served herein, as follows:

On the Attorney General, State of Iowa, respondent herein, by mailing three copies in a duly addressed envelope with first class postage prepaid; to Thomas Miller, Attorney General of Iowa, Kermit Dunahoo, Assistant Attorney General, State Capitl Building, Des Moines, Iowa, 50319.

Alfredo G. Parrish

Alfredo G. Parrish
906 Savings & Loan Building
Des Moines, IA 50309
515-244-5737

ATTORNEY FOR PETITIONER

Subscribed and sworn to before me this 5th day of November 1979.

Pauline Roe

Notary Public - State of Iowa

My commission expires 9/30/82 .

PAULINE ROE
MY COMMISSION EXPIRES
9/30/82

Supreme Court, U. S.
FILED
DEC 20 1979
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1979

No. 79-766

CURTIS WILLIAM McGHEE, JR.,

Petitioner,

vs.

STATE OF IOWA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

BRIEF FOR RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

	Pages
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statement of Facts	2
Argument	2
Conclusion	7

CITATIONS

Cases:

Barker v. Wingo, 407 U. S. 514 (1972)	5, 6
In Re Gault, 387 U. S. 1 (1967)	6
In Re Winship, 397 U. S. 358 (1970)	6
Micale v. State, 76 Wis. 2d 370, 250 N. W. 2d 458 (1977)	3
Miranda v. Arizona, 384 U. S. 436 (1966)	2, 3
Mock v. Rose, 472 F. 2d 619 (6th Cir. 1972), cert. denied, 411 U. S. 971 (1973)	3
North Carolina v. Butler, — U. S. —, 99 S. Ct. 1755 (1979)	3
People v. Washington, 115 Ill. App. 2d 318, 253 N. E. 2d 677 (1969)	3
State v. McGhee, 280 N. W. 2d 436 (Iowa 1979)	3, 6, 7

CITATIONS—Continued

	Pages
State v. Parker, 44 Ohio St. 2d 172, 339 N. E. 2d 648 (1975)	3
State v. Riddick, 291 N. C. 399, 230 S. E. 2d 506 (1976)	3
State v. Sassman, 226 N. W. 2d 808 (Iowa 1975)	5
State v. Satterfield, 257 Iowa 1193, 136 N. W. 2d 257 (1965)	5
United States v. DiGiacomo, 579 F. 2d 1211 (10th Cir. 1978)	3
United States v. Marion, 404 U. S. 307 (1971)	7

CONSTITUTIONAL AND STATUTORY PROVISIONS:

Amendment 6, United States Constitution	5, 6
Amendment 14, United States Constitution	5
Section 795.1, Code of Iowa 1977	5
Iowa R. Crim. P. 27 (2) (a), Chap. 813, Code of Iowa 1979	7

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—o—

BRIEF FOR RESPONDENT IN OPPOSITION

—o—

OPINION BELOW

The opinion of the Iowa Supreme Court is adequately set out as Appendix A of the petition.

—o—

JURISDICTION

The jurisdictional requisites are adequately set forth in Par. 2, at page 2 of the petition.

QUESTIONS PRESENTED

1. Whether petitioner's Fifth Amendment right to silence was violated when an incriminating statement was taken from him during custodial interrogation without the police having first advised him of his right to terminate questioning at any time?

2. Whether a minor in custody has the right to a speedy trial which attaches when a judicial determination is made that probable cause exists to believe he has committed an offense?

———o———

STATEMENT OF THE FACTS

The Facts necessary for a determination of the propriety of review by writ of certiorari are adequately set out in the Statement at Page 3 of the Petition.

———o———

ARGUMENT

I.

Petitioner cites as error the admission against him of statements made by him to police officers. Petitioner asserts that he had not been sufficiently warned of his constitutional rights as required by *Miranda v. Arizona,* 384 U. S. 436 (1966), in that he had not been explicitly told that he could stop the questioning at any time. Petitioner

further asserts that since there are some states that require this warning while others do not, this Court should determine if such a warning is constitutionally required. The State believes review by this Court is unnecessary.

While, as noted, in the petition, some states have stated that a warning that a suspect can stop the questioning at any time should be separately and specifically given, *Micale v. State,* 76 Wis. 2d 370, 251 N. W. 2d 458 (1977); *State v. Riddick,* 291 N. C. 399, 230 S. E. 2d 506 (1976), this is not a requirement of *Miranda. United States v. DiGiacomo,* 579 F. 2d 1211, 1214 (10th Cir. 1978); *State v. McGhee,* 280 N. W. 2d 436 (Iowa 1979). Nor does it add any right that is not already given to a suspect under *Miranda.* In *Miranda,* the Court stated:

> Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and *in affording a continuous opportunity* to exercise it.

Miranda v. Arizona, 384 U. S. at 490. Iowa and most other jurisdictions have determined that the lack of a warning that a person can stop questioning "goes to the voluntariness of the later statements." *State v. McGhee,* 280 N. W. 2d 436, 442 (Iowa 1979). *See also Mock v. Rose,* 472 F. 2d 619 (6th Cir. 1972), cert. denied, 411 U. S. 971 (1973); *State v. Parker,* 44 Ohio St. 2d 172, 339 N. E. 2d 648 (1975); *People v. Washington,* 115 Ill. App. 3d 318, 253 N. E. 2d 677 (1969).

Recently in *North Carolina v. Butler,* — U. S. —, 99 S. Ct. 1755 (1979), this Court refused to attach any more *per se* rules to the *Miranda* requirements. In that case North Carolina held that an explicit waiver of the right

to counsel was required. In reversing this Court stated that the waiver of right to counsel was to be determined from all the facts and circumstances, and the Court could see no reason to discard that standard and replace it with an inflexible per se rule.

While the instant case differs in that it deals with informing the suspect of his rights, the standard should likewise not be changed. The requirement remains that a suspect be fully informed of his rights and a determination be made that he understands those rights. This latter determination may be made easier by informing a suspect that he has a right to stop questioning, but it is in no way changed. It is required that the petitioner be told of his right to remain silent. He must understand this right. If he does, it adds nothings to tell him he can stop talking because he understands that already. To apply a *per se* requirement would merely impose on the states a rule which might or might not aid in that determination. Such a rule should not be imposed and is not constitutionally mandated.

It should also be noted that Petitioner in this case showed his understanding that he could terminate the questioning. As shown in the recital of facts in the petition, prior to making any incriminating statements Petitioner did terminate the questioning. He stated he wanted to think about it. He was not interrogated further for three hours and was then given new warnings. It was thus made clear to him that the questioning would stop at his request.

The Petitioner has not shown adequate grounds to justify the review by this Court pursuant to a Writ of Certiorari.

II.

Petitioner asserts that the Iowa Supreme Court application of the Iowa speedy trial statute, § 795.1, Code of Iowa (1977), violated his constitutional right to a speedy trial under the Sixth Amendment, as applied to the states by the Fourteenth Amendment. Petitioner was first charged as a juvenile. He was then transferred to be tried as an adult in the Iowa District Court. Petitioner asserts that the computation of time in which an indictment must be found and a trial held must begin at the time he was initially brought into the juvenile system. The Iowa Court held that the computation of time, *under the Iowa statute,* began when petitioner was transferred to the district court from the juvenile court. The Iowa court made no determination of petitioner's Sixth Amendment right. And although it has previously stated that the Iowa statute was intended to implement the Sixth Amendment, *State v. Satterfield,* 257 Iowa 1193, 136 N. W. 2d 257 (1965), it has been applied more stringently. Iowa Courts have held the statute mandates dismissal after the statutory deadline absent a showing by the prosecution of good cause, *State v. Sassman,* 226 N. W. 2d 808 (1975), while the Sixth Amendment guarantee is enforced by a balancing of the reason for and the length of the delay against the prejudice to the defendant caused by the delay and the assertion of his right. *Barker v. Wingo,* 407 U. S. 514 (1972). The State urges that petitioner has therefore not presented a Sixth Amendment question upon which certiorari should be granted.

The State also believes that the Sixth Amendment does not require that the Iowa Statute be applied to juve-

niles just as it would be applied to adults. While it may be assumed that the Sixth Amendment applies to juveniles it is not required that the statutory implementation of that amendment set out in state criminal law be applied identically to state juvenile proceedings. Neither of the leading cases in this area make such a requirement. *See, In Re Gault,* 387 U. S. 1 (1967); *In Re Winship,* 397 U. S. 358 (1970). *Gault* and *Winship* both stated that the applications of the due process clause set out in those cases would "not compel the states to abandon or displace any of the substantive benefits of the juvenile process." *In Re Gault,* 38 U. S. at 31; *In Re Winship,* 397 U. S. at 367. Neither would application of the Sixth Amendment balancing test required by *Barker v. Wingo* cause abandonment of the benefits of the juvenile process. However, the application of the Iowa speedy trial statute in the manner asked by petitioner

> [W]ould not only disrupt the potential benefits of the juvenile proceeding, but would be to apply the 30-day period simultaneously to both juvenile and, in the event of a waiver, district court proceedings. Such an application would be beyond the scope of equal treatment underlying *Gault* and could place unreasonable time constraints on proceedings.

State v. McGhee, 280 N. W. 2d at 439. A rush to ensure that the proceedings were concluded in 30 days would inevitably lead to some unwise transfers or to unwise indictments. This cost, even if the number of such transfers is minimal, is too great in light of the fact that if any actual prejudice does accrue to a juvenile due to his lack of speedy trial or indictment he can seek relief under the federal constitution regardless of the statutory interpretation. His guarantee to due process of law is not lessened by the use of an additional procedure designed to ensure greater protection. As noted in *United States v. Marion,* 404 U. S. 307, 313 (1971), the essential ingredient of the speedy trial right is orderly expedition not just speed.

It should also be noted that the Iowa speedy trial rule has now been changed, and the time for indictment and trial is computed from the time of arrest not from the time a person is held to answer. Iowa R. Crim. P. 27 (2) (a) Ch. 813, Code of Iowa (1979). The Iowa Court in *McGhee* expressly reserved the question of how the new rule would be applied to juveniles who are transferred to district court. *State v. McGhee,* 280 N. W. 2d at 438 n. 1.

The state therefore urges that the petitioner of certiorari has not stated sufficient grounds upon which to obtain review and the writ should be denied.

———o———

CONCLUSION

The Writ of Certiorari should be annulled and the Petition dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas D. McGrane, Assistant Attorney General for the State of Iowa, hereby certify that on the 19th day of December, 1979, I mailed three (3) copies of Brief for Respondent in Opposition, correct 1st class postage prepaid to:

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I further certify that all parties required to be served have been served.

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